No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

American President Lines, Ltd.,
a corporation,
Appellant,

vs.

E. B. Welch,
Appellee.

APPELLANT'S BRIEF

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JURISDICTION

Jurisdiction of this Court exists, by virtue of 28 U.S.C. § 1291 and a Notice ofAppeal (R. I, 51)[1] filed on February 21, 1966, from a Final Decree (R. I, 49) in Admiralty entered in the United States District Court for the Northern District of California on November 24, 1965.

The District Court had jurisdiction, under 28 U.S.C. § 1333, by virtue of a seaman's Libel (R. I, 1) for damages

[1]The record in this case consists of 3 volumes and various exhibits. References to the numbered volumes are by volume and page, e.g., (R. I, 17). Two depositions, those of Pak and Goodheim, were taken by Welch before trial and were introduced into evidence at the trial without reading them in open court and are referred to by deponent and page, e.g., (Pak, 33). All other exhibits are referred to by their original designations, e.g., (Resp. Exh. B).

under the Jones Act (46 U.S.C. § 688) and the General Maritime Law.

STATEMENT OF THE CASE

E. B. Welch, a licensed Chief Engineer in the United States Merchant Marine (R. II, 5), was employed by American President Lines (R. II, 5), owner and operator of the SS PRESIDENT ROOSEVELT (R. II, 4) as a third assistant engineer, earning approximately $1,000 per month (R. II, 51, 52).

On February 18, 1964, en route from San Francisco to Los Angeles, Welch noticed that a pump in the forward engine room was functioning improperly. Welch was responsible for the general maintenance of this pump, in addition to his normal work "on watch" in the forward engine room of the SS PRESIDENT ROOSEVELT (R. II, 53, 54). On the morning of February 19, 1964, when the vessel was in Los Angeles Harbor, First Assistant Engineer Pak instructed Welch to "Take the pump apart, disassemble it and find out what is wrong and fix it." (R. II, 56). Welch did not expect detailed instructions (R. II, 74).

Welch and Pak had worked together many years on several of American President Lines' vessels (R. II, 52) and Welch had great respect for Pak's ability (R. II, 53). Moreover, American President Lines had great confidence in the ability of Welch (R. III, 5). There was no reason to anticipate that the repair task assigned to Welch would be done improperly.

Between 9:00 A.M. and noon an oiler was helping Welch. During the morning they disconnected the two pistons and crosshead and laid them on the deck (R. II, 65). At noon the oiler disappeared and Welch assumed that he went off watch (R. II, 16). Welch did not seek additional help nor did he ask Pak for any (R. II, 68). Welch did not look for Pak (R. II, 69) nor look around the engine room for any additional help (R. II, 68). Nor did he ask the Engine Storekeeper, another person with authority to turn out additional helpers, for any help (R. II, 69).

The pump crosshead is a two-piece cast iron block, about six inches square, which is held together by four studs (Resp. Exhs. A, B, C). Before Welch started the job he conferred with Pak about the defective pump and they surmised that the trouble was a loose piston nut but they could not tell which piston nut was loose (R. II, 92). Later, during the dismantling, Welch discovered that the trouble was in the crosshead. If their surmise had been correct, it would *not* have been necessary to carry the crosshead away from the pump site (R. II, 92).

At about 2:00 P.M. Welch carried the crosshead alone from the site of the pump up a stairway or "ladder". While attempting to step across the threshold of a doorway from the engine room into the machinery repair space, he felt a "pop" in his back, which the Court found to be the cause of his disability.

Welch testified that the crosshead, when bolted together as he was carrying it, weighed between 110 and 125 pounds (R. II, 15). He had tried to dismantle it first at the pump site, but could not do so (R. II, 87). Pak did

not tell Welch to carry the crosshead alone (R. II, 56). Welch, therefore, was the only person who knew that the crosshead could not be completely disassembled at the pump site and that it had to be moved. He believed he was physically capable of carrying the crosshead, even though it was still bolted together (R. II, 85).

Welch testified, and there is no evidence to the contrary, that it was usual and customary for an Engineering Department employee to carry weights up to 80 or 90 pounds and that he had done this. His complaint was simply that the crosshead was too heavy for him to carry because it weighed 110 to 125 pounds (R. II, 62).

As the Court noted toward the conclusion of the cross-examination of Welch, it was hard for the Court to understand how a block of this size could weigh that much (R. II, 87). The vessel later proved conclusively that it weighed only 42 pounds (Resp. Exhs. C, D), or about one-third of what Welch and his fellow engineering officers attempted to have the Court believe.

The Court found that the vessel was unseaworthy because the carrying of the crosshead "was rated aboard Respondent's vessel as a two-man job." (R. I, 43). Appellant denies that there is any basis in the record for this Finding. There is testimony that the carrying of a 110 to 125 pound crosshead would be a two-man job (R, II, 20; Pak, 9; Goodheim, 5). Welch (R. II, 60) and Pak (Pak, 23) admitted that no one had ever carried the crosshead before. There is no evidence in the record that the industry custom and practice requires two men to carry a 42-pound crosshead. The Court did not find negligence, but held that Respondent's failure to furnish

Libelant with an additional man in the afternoon to transport the crosshead to the machine shop rendered the vessel unseaworthy (R. I, 44). The Court also found 50% contributory negligence because Welch did not request help (Finding 20, R. I, 47). This Finding has been cross-appealed.

SPECIFICATION OF ERRORS

The following errors are relied upon by Appellant:

1. The District Court's Finding No. 6 is clearly erroneous to the extent that it states that carrying the crosshead in this case was rated as a two-man job, since there was no evidence that the carrying of such a 42-pound crosshead was a two-man job.

2. The District Court erred in finding and holding (Finding No. 8; Conclusion No. 2) that the vessel was unseaworthy because it failed to provide two men to carry the 42-pound crosshead, since the carrying of such an object by one man was within usual and customary standards and the warranty of seaworthiness with respect to crew requires that the vessel be adequately manned overall but not that a particular number of men be assigned to perform each task aboard.

SUMMARY OF ARGUMENT

1. It was conclusively shown that the crosshead carried by Welch and supposed to have caused his disability weighed 42 pounds. It was shown, without contradiction, that weights much in excess of this were proper for one

man to carry. The only evidence upon which the finding of impropriety was based was discredited testimony that the crosshead weighed about 100 pounds and that the carrying of such weights called for two men. Hence the finding that the carrying of the crosshead was a two-man job was unsupported by the evidence and clearly erroneous.

2. The requirement of the warranty of seaworthiness that the vessel be reasonably fit for the service in which she is intended to be employed, as applied to the sufficiency of the crew, requires only that the overall manning of the vessel be adequate and not that there be the number of men which hindsight might suggest lifting each weight, pulling each line or otherwise engaged in each task aboard. The Court below, after erroneously finding the carrying of a 42-pound weight to be a two-man task, misconstrued this Court's prior ruling as imposing the latter test and ignored the authorities in point holding that the test is based upon adequacy of overall manning.

ARGUMENT

I. THE COURT'S FINDING THAT THE CARRYING OF THE 42-POUND CROSSHEAD WAS "RATED AS A TWO-MAN JOB" IS SUPPORTED BY NO EVIDENCE AND IS CLEARLY ERRONEOUS.

A comparison of the Findings with the transcript indicates that the Court has neglected to mention several important factors. The Court described the crosshead as being "of considerable weight" (R. I, 43). It weighs exactly 42 pounds (Resp. Exhs. A, B, C). Moreover, the Court does not mention that the crosshead consisted of

two blocks which are bolted together with studs and nuts (R. II, 93) and that, when these studs and nuts are dismantled and the two halves are taken apart, each half of the crosshead weighs about 21 pounds (Pak, 19, 20). The Court also failed to state that no one had originally intended to move the crosshead (R. II, 92), or that only Welch later found out that the crosshead would have to be moved, or that Welch alone found out that the two halves of the crosshead could not be separated at the pump site.

The following legal principles are axiomatic:

1. The plaintiff has the burden of proving the allegations of his claim by a preponderance of the evidence.

2. If plaintiff fails to introduce any evidence to support a proposition which he has the burden of proving, he has failed to carry his burden.

3. The defendant does not have the burden of disproving the plaintiff's allegations.

4. If the plaintiff proves that a vessel is unseaworthy, he must also prove that the unseaworthiness proximately caused the injury.

The Trial Court was clearly in error because it rendered a judgment for plaintiff although he did not satisfy the requirements of these principles.

In order to repair the pump it was necessary for Welch to dismantle the pump. This dismantling required a helper—who was present until noon. By that time, as Welch admits, the pistons and the crosshead were dismantled from the pump and were lying on the deck at the pump site (R. II, 65). The Court has commingled the

two separate operations of "dismantling" and "carrying", and has treated them as if they were one task. "The job of *dismantling* this particular pump *and carrying* its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job." (R. I, 43) (emphasis added). But there is no evidence in this record that carrying a 42-pound crosshead was "rated aboard this vessel as a two-man job."

It is not disputed that Welch (R. II, 19), Pak (Pak, 9, 16, 26), and Goodheim (Goodheim, 5) stated that carrying the crosshead from the engine room to the machine shop was a two-man job. These statements were made, however, under the erroneous assumption that the crosshead weighed about 100 pounds (R. II, 15; Pak, 7; Goodheim, 5). Welch testified, before the true weight of 42 pounds was known, that it was usual and customary to carry objects weighing up to 80 or 90 pounds (R. II, 62). Welch's testimony that it was usual and customary for an Engineering Department employee to carry weights of up to 80 or 90 pounds, given under these circumstances, is of great probative value because it is testimony as to facts made without knowledge of the legal consequences of those facts.[2] This testimony was uncontradicted and

[2]The Court may be interested in the following concrete illustration of this principle from another part of the record: When the vessel finished its cross-examination of Welch (R. II, 87), the Court asked counsel for the vessel whether or not there was any dispute about the weight of the block because "it seems a lot of weight for a block that is six to eight inches cubed." (R. II, 87). Counsel for the vessel stated, "There is a very vigorous dispute." Welch's counsel then interjected, "This is the first time I heard of a dispute on it." The vessel then terminated cross-examination. Welch's counsel then conducted redirect examination and then rested. The next morning Welch's counsel requested and was granted permission to recall Welch (R. II, 95). Welch then testi-

the reasonableness of the usual and customary practice was not called into question. Moreover, Pak stated (when he thought that the whole crosshead weighed 100 pounds) that carrying one of the halves of the crosshead was a *one-man* job (Pak, 22). A fortiori, carrying this crosshead which really weighed 42 pounds, was a one-man job.

Welch (R. II, 60) and Pak (Pak, 23, 33) had never seen anyone carry this crosshead or a similar one nor had they ever done it themselves before this time. Accordingly, it is clear that all of the evidence showing that the carrying of this crosshead was a two-man job was based upon the concept that the strength of two men was needed to lift and carry a crosshead weighing about 100 pounds. Indeed, during the deposition of Pak, Welch's counsel asked Pak, *after* Pak had stated that the crosshead weighed about 100 pounds, if "the usual and customary way is to carry it manually and [if] that manual carrying requires the strength and agility of two men" and Pak answered, "the whole crosshead, yes . . ." (Pak, 26).

When evidence was introduced to show that the true weight of the crosshead was 42 pounds (Resp. Exhs. A, B, C), there was no longer any room for reasonable men to differ as to its weight. It would only be found that the crosshead weighed 42 pounds. Thus any prior statements that the carrying of the crosshead was a two-man job, made on the erroneous basis that the crosshead weighed 100 pounds, were rendered irrelevant. The find-

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fied that after carrying the pistons (not the crosshead) his back "felt tight" (R. II, 99). Compare this with his testimony on the afternoon before he found out about the true weight of the crosshead. He then stated that he had not hurt himself in any way in carrying the pistons and that it was only the crosshead incident which was the cause of his disability (R. II, 67).

ing (No. 6, R. I, 43) based upon those irrelevant statements is clearly erroneous.

II. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN FINDING THE VESSEL UNSEAWORTHY BECAUSE THERE WERE NOT TWO MEN ASSIGNED TO CARRY THE CROSSHEAD.

The Supreme Court has authoritatively defined the responsibility of a vessel owner for seaworthiness in the following terms, in *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539, 550, 1960 A.M.C. 1503, 1512:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship which will weather every conceivable storm or will withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."

As applied to the numerical sufficiency of the crew, this doctrine means that the vessel, as a whole, must be provided with an adequate crew and not that the number of crewman working at a given task will prove adequate. *Waldron v. Moore-McCormack Lines, Inc.,* 356 F.2d 247, 1966 A.M.C. 1844 (2d Cir.). This was all that was held in *June T., Inc. v. King,* 290 F.2d 404, 1961 A.M.C. 1431 (5th Cir.).

After finding, without adequate evidence, that the carrying of 42 pounds was a two-man job, the District Court concluded that the vessel was unseaworthy when that

weight was carried by one man alone and based that conclusion upon *American President Lines v. Redfern,* 345 F.2d 629, 1965 A.M.C. 1723 (9th Cir.), and *June T., Inc. v. King,* 290 F.2d 404, 1961 A.M.C. 1431 (5th Cir.) (Conclusion 2, R. I, 47). But the Court below neglected to apply this Court's standard in *Redfern,* which requires a finding of the existence of a "dangerous condition"[3] at the time of the accident, such as the stuck sea valve in *Redfern.* There is no finding here of such a "dangerous condition", nor would one be justified. And, as we have already pointed out, *June T., Inc. v. King, supra,* relates to inadequate overall manning of the vessel.

With foresight based upon the usual customs and practices, it was perfectly proper for Welch to carry the 42-pound object. In this connection, too, the District Court neglected to give effect to this Court's statement in *Redfern* concerning the effect of industry practices:

> "We of course are aware that while an owner has an absolute duty to provide a ship and appurtenances that are seaworthy, nevertheless he is not an insurer of the safety of the crew and the measure of his duty is a ship reasonably fit for service. And we fully agree with appellant that generally the determination of what is reasonable rests upon a comparison of the practices that were followed and the conditions that appear in a particular case with those customarily followed and found in the industry." 345 F.2d at 631, 1965 A.M.C. at 1725.

It is evident that the Trial Judge applied, as one might expect, the same test here as he expounded in his opinion

[3]345 F.2d at 631, 1965 A.M.C. at 1725.

in *Victory Carriers, Inc. v. Guiton,* No. 20,405 (9th Cir.) to the effect that, despite the absence of any defect, negligence or other impropriety judged by foresight, unseaworthiness follows whenever hindsight shows that injury resulted from a combination of forces involved in the operation.[4]

The case in point was not *Redfern,* but *Waldron v. Moore-McCormack Lines, Inc.,* 356 F.2d 247, 1966 A.M.C. 1844 (2d Cir.), *cert. granted,* 35 U.S.L. Week 3124 (U.S. Oct. 11, 1966) (No. 233), which directly and solely concerned the question whether a vessel could be found unseaworthy when a seaman suffered a back injury carrying a line which, he contended, was so heavy as to require the assignment of more help to carry it. The Court was asked to hold that the jury should be permitted to find unseaworthiness and refused to do so, saying:

> "The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been required is that the vessel be properly

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[4]". . . It means, as best we understand the authorities, a condition of the ship, its gear, equipment and appurtenances as they are then being used which created a hazard to the health or safety of the person to whom the duty of seaworthiness is owed.
* * *
". . . The hazards were inherent in the operation, and although injury would not normally be anticipated, it was always inevitable that upon the concurrence of the physical forces which were created by such use of the equipment under conditions then existing, the injury would be suffered in the exact manner it was suffered by Guiton. If this means that shipowners and stevedores must revert to using coolies to stow cargo by hand or must refuse to accept such heavy cargo so packaged to avoid liability for unseaworthiness, so be it. This is all we can make of the recent decisions." Transcript of Record, pp. 14, 15, in *Victory Carriers, Inc. v. Guiton,* No. 20,405 (9th Cir.).

manned. That is to say, in order to be 'reasonably suitable for her intended service' the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide 'an accident proof' ship, which the teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell Trawler Racer, Inc.,* 1960, 362 U.S. 539, 550, *supra,* specifically negates.'' 356 F.2d at 251, 1966 A.M.C. at 1849.

CONCLUSION

For the foregoing reasons, we submit that this Court should set aside Findings 6 and 8 and Conclusion 2 and reverse the Decree below.

Dated, San Francisco, California,
November 25, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GRAYDON S. STARING,
Of Attorneys for Appellant.

(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS

Libelant Welch's Exhibits		Identified	Admitted
1	1963 Income Tax Return	R. II, 9	R. II, 9
2	Honolulu Hospital Records	R. II, 33	R. II, 33
3	Report of Injury or Illness	R. II, 34	R. II, 34
4	Marine Hospital Records	R. II, 40	R. II, 41
5	Dr. Rose's Medical Records	R. II, 42	R. II, 43
6	Dr. J. M. Harris' Medical Records	R. II, 43	R. II, 43
Respondent American President Lines, Ltd.'s Exhibits			
A	Photograph	R. II, 48	R. II, 48
B	"	R. II, 48	R. II, 48
C	Crosshead	R. III, 7	R. III, 9
D	Weighmaster's Certificate	R. III, 9	R. III, 9